DECISIONS OF THE SUPREME COURT OF THE UNITED STATES ON CONSTITUTIONAL QUESTIONS

1914–1917

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In previous issues of this REVIEW[1] Professor Wambaugh and the late Judge McClain have summarized the decisions of the Supreme Court on constitutional questions from 1909 to 1914. It is the purpose of this and a succeeding paper to deal in like manner with the decisions of the last three years. Owing to the number of cases decided during the triennium, the writer must content himself with the rôle of annalist and refrain from assuming that of analyst. For the benefit of those who desire fuller comment or criticism, references are given to articles and notes in various legal periodicals discussing the more important cases.

Since the expiration of the October term of 1913, three changes have occurred in the personnel of the bench. Mr. Justice Lurton died July 12, 1914, and his successor, Mr. Justice McReynolds, took his seat October 12, 1914. Illness prevented Mr. Justice Lamar from participating in any of the decisions of

[1] *American Political Science Review* (1910) IV, 483–497; (1912) VI, 513–523; (1915) IX, 36–49. For useful reviews of decisions under the due-process and equal-protection clauses, see Francis J. Swayze, "Judicial Construction of the Fourteenth Amendment," 26 *Harvard Law Review* 1; Charles Warren, "The Progressiveness of the United States Supreme Court," 13 *Columbia Law Review* 294; and "A Bulwark to the State Police Power—The United States Supreme Court," 13 *Columbia Law Review* 667. For a chronological list of all the Supreme Court decisions on the fourteenth amendment see C. W. Collins: *The Fourteenth Amendment and the States* (Little, Brown & Co., 1912), Appendix E. For chronological and other lists of state and federal statutes declared unconstitutional by the Supreme Court see appendices in B. F. Moore: *The Supreme Court and Unconstitutional Legislation* (Columbia University Studies in History, Economics and Public Law, LIV, No. 2, Longmans, Green & Co., 1913).

the October term of 1915. He died on January 2, 1916. The commission of Mr. Justice Brandeis, who succeeded him, was not recorded until June 5, 1916, so that during the 1915 term only eight justices participated in the work of the court. Mr. Justice Hughes resigned June 10, 1916, to accept the Republican nomination for the presidency, and his successor, Mr. Justice Clarke, took his seat on October 9, 1916. The bench as at present constituted consists of Chief Justice White, appointed associate justice by President Cleveland and chief justice by President Taft; Mr. Justice McKenna, appointed by President McKinley; Justices Holmes and Day, appointed by President Roosevelt; Justices Van Devanter and Pitney, appointed by President Taft; and the three new justices appointed by President Wilson.

During the last three years, as in the years immediately preceding, the commerce clause and the fourteenth amendment have raised by far the greater part of the important constitutional questions which the court has had to answer. And these are the questions on which the court gets the least light from the language of the Constitution. For the commerce clause contains no definition of what commerce is interstate, no indication of what shall be deemed a regulation of commerce, and no declaration with respect to the effect of the grant to Congress on the reserved powers of the states. The due-process and equal-protection clauses merely indicate that there is a boundary which legislative interference with individual liberty and property must not transgress. The lines of that boundary are marked out, not by the Constitution, but, as the Supreme Court has told us, "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."[2]

I. THE COMMERCE CLAUSE

The applications of the commerce clause include the determination of what commerce is foreign or interstate and what intrastate, and the determination of what constitutes a regulation of commerce. For it is familiar doctrine that not all state

[2] Davidson v. New Orleans (1878) 96 U. S. 97, 104.

action which has some effect on interstate commerce amounts to a regulation thereof. In discussing state interferences with interstate commerce, the court uses the word "regulation" as a word of art to denominate only such factual regulations as have a direct effect on interstate commerce. Those state interferences with interstate commerce which merely incidentally affect such commerce are not called "regulations" thereof. The distinction is of course one of degree. The state may interfere with interstate commerce by the exercise of its taxing powers or by police regulations. In considering the applicability of state police regulations to commerce which is interstate, it is important to know whether or not Congress has dealt with the same subject. For though some state interferences are regarded as prohibited by the Constitution, others are within the power of the state unless there has been some congressional action which is deemed to preclude state legislation. In presenting the cases on interstate and foreign commerce, attention will first be given to those defining the power of Congress. This definition depends upon an interpretation, not only of the commerce clause, but also of the due-process clause of the fifth amendment. The cases involving the power of the states will be classified under the heads of taxation and the police power, and the latter head will be subdivided into state action in the absence of congressional regulation and state action after congressional regulation.

POWERS OF CONGRESS UNDER THE COMMERCE CLAUSE

The most important congressional statutes with which the court has had to deal in the last three years are the Webb-Kenyon Act and the Adamson Law. In Clark Distilling Co. v. Western Maryland Ry. Co.[3] the former was sustained and the

[3] (1917) 242 U. S. 311. Justices Holmes and Van Devanter dissented, without opinion. See D. O. McGovney, "The Webb-Kenyon Law and Beyond," 3 *Iowa Law Bulletin* 145; S. P. Orth, "The Webb-Kenyon Law Decision," 2 *Cornell Law Quarterly* 283; T. R. Powell, "The Validity of State Legislation Under the Webb-Kenyon Law," 2 *Southern Law Quarterly* 112; Lindsay Rogers, "The Webb-Kenyon Decision," 4 *Virginia Law Review* 558. See also notes in 17 *Columbia Law Review* 144, 30 *Harvard Law Review* 491, 1 *Minnesota Law Review* 179, and 26 *Yale Law Journal* 399.

court thereby declared that it was within the power of Congress to prohibit the interstate transportation of intoxicating liquor intended by any person interested therein to be received, possessed, used or sold in violation of the law of the state of destination. Two years earlier in Adams Express Co. v. Kentucky[4] the court had held that the congressional act did not apply unless the liquor was intended to be used in violation of the law of the state of destination. The Clark Distilling case construes the act more broadly, although it does not make entirely clear whether a state can forbid receipt of liquor from other states unless it also forbids and penalizes its possession after receipt.

The most serious constitutional questions connected with the federal statutes dealing with interstate commerce in intoxicating liquor concern the powers of the states after congressional action designed to permit state interferences with such commerce. Rigorous adherence to the schematism of this article would allocate the discussion of this problem to the section dealing with state police power affecting interstate commerce after congressional regulation of the same subject matter.[5] But inasmuch as the effect of the other congressional action to be considered has been to lessen rather than enlarge the powers of the state, it will serve convenience if not logic to include at this point the cases dealing with the effect of the Wilson Act and the Webb-Kenyon Act on the power of the states to interfere with intoxicating liquor of extrastate origin.

Three cases annulling state interferences after the Wilson Act and before the Webb-Kenyon Law demonstrate the need of the latter to enable the states to effectuate their prohibition policies. Rossi v. Pennsylvania[6] held that the state could not punish the delivery within the state of liquor brought from other states to complete executory sales negotiated within the state.

[4] (1915) 238 U. S. 190. See 81 *Central Law Journal* 416, and 3 *Virginia Law Review* 143.

[5] See *infra* pp. 40–45.

[6] (1915) 238 U. S. 62. See Lindsay Rogers, "Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act," 4 *Virginia Law Review* 174.

Rosenberger v. Pacific Express Co.[7] declared unauthorized by the Wilson Act a state statute imposing a prohibitive license tax on express companies bringing c.o.d. shipments of liquor into the state. The facts of this case arose before the passage of the act of Congress forbidding the interstate shipment of liquor under c.o.d. contracts.[8] Kirmeyer v. Kansas[9] held that Kansas could not enjoin as a nuisance a liquor business alleged to be conducted in Kansas, but which the court found was in contemplation of law conducted in Missouri, for the reason that all mail orders received in Kansas were taken to Missouri before being opened, and all liquor received by the dealer in Kansas was at once taken to a Missouri warehouse from which all Kansas orders were filled. The fact that the person conducting the business was domiciled in Kansas and kept there the wagons and teams used in the business was held to be immaterial.

The Adams Express case[10] gave rise to apprehensions that the Webb-Kenyon Act had not accomplished all that the arid states had desired. For it sustained the interpretation of the Kentucky court that the federal statute had no application unless the liquor shipped in interstate commerce was to be used in violation of some law of the state of destination. So a Kentucky statute forbidding the importation of liquor into dry territory was held incapable of interfering with liquor consigned to an intending consumer whose private use was not under the ban of Kentucky law. Since the Kentucky court had held that the prohibition of private, gentlemanly consumption of liquor would violate the inalienable rights of citizens of a free common-

[7] (1916) 241 U. S. 48. See 15 *Michigan Law Review* 168.

[8] Comp. Stat. 1913, Sec. 10,409.

[9] (1915) 236 U. S. 568. For other articles dealing with the problem of state prohibition laws and interstate commerce, see W. T. Denison, "States' Right and the Webb-Kenyon Liquor Law," 14 *Columbia Law Review* 321; Lindsay Rogers, "The Power of the States over Commodities Excluded by Congress from Interstate Commerce," 24 *Yale Law Journal* 567; Lindsay Rogers, "Unlawful Possession of Intoxicating Liquors and the Webb-Kenyon Act," 16 *Columbia Law Review* 1; C. R. Snyder, "Growth of State Power under the Federal Constitution to Regulate Traffic in Intoxicating Liquor," 25 *West Virginia Law Quarterly* 42; Charles H. Safely, in 4 *Iowa Law Bulletin* 221.

[10] *Supra*, note 4.

wealth,[11] there seemed to be no way by which the Kentucky legislature could prevent interstate shipments direct to such consumers. But the Clark Distilling case, while professing to distinguish the Adams Express case, really discountenanced the previous interpretation given to the Webb-Kenyon Law. Under the later interpretation the Webb-Kenyon Law takes away the protection of the commerce clause from all liquor intended to be received and possessed in violation of the law of the state. But, since the West Virginia statute applied in the Clark Distilling case forbade possession after unlawful receipt, we do not yet know whether the Webb-Kenyon Law will allow a state, which does not prohibit and penalize possession as well as receipt, to prevent the invasion of its territory by liquor from other states.[12]

The Adamson Act was sustained in Wilson v. New.[13] The decision made it clear that the regulation of the contractual relations between employers and employees engaged in interstate commerce might be a regulation of the commerce in which they were engaged, thus discrediting somewhat the doctrine of Adair

[11] "The Bill of Rights which declares that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness . . . would be but an empty sound if the Legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public." Judge Barker, in Commonwealth v. Campbell (1909) 133 Ky. 50. See 81 *Central Law Journal* 345, 28 *Harvard Law Review* 818, and 4 *Virginia Law Review* 236.

[12] Subsequent to the decision in the Clark Distilling case, Congress passed the so-called Reed Amendment (39 Stat. L. 1069) punishing any person who "shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce . . . into any state or territory" whose laws "prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes." The statute also contains a prohibition against liquor advertisements and the solicitation of orders for liquor. See J. K. Graves, "The Reed 'Bone Dry' Amendment," 4 *Virginia Law Review* 634.

[13] (1917) 243 U. S. 332. Three dissenting judges, Justices McReynolds, Pitney and Van Devanter, thought the act not a regulation of commerce. The two latter found the act wanting in due process both because of its substantive effects and because of the want of due consideration by Congress prior to its passage. This latter ground was the basis of the dissent of Mr. Justice Day. See A. A. Ballantine, "Railway Strikes and the Constitution," 17 *Columbia Law Review* 502; C. W. Bunn, "The Supreme Court on the Adamson Law," 1 *Minnesota Law Review* 395; C. K. Burdick, "The Adamson Law Decision," 2 *Cornell*

v. United States[14] which declared that it was not a regulation of interstate commerce to forbid interstate carriers to discharge employees because of their membership in a labor union. It may be that the doctrine of Wilson v. New on the interstate commerce question must be limited to situations where there is failure of employers and employees to agree on a wage scale and where a threatened strike would, if consummated, seriously interrupt the commerce of the country. These considerations undoubtedly affected the majority of the court in holding that the law was not wanting in due process. The opinion of the chief justice on the due-process question not only seems to rely on these circumstances but is clearly conditioned on the facts that the wage scale fixed by Congress was for a limited period, was a compromise between the respective demands of the employers and employees, and did not deprive the carriers of a fair return on the fair value of their property. The chief justice is careful to point out that the case does not stand for any doctrine that the legislature can fix wages in businesses which are not public utilities, nor even in public-utility enterprises when there is no threatened interruption of the service.

In two cases sustaining congressional interference with foreign commerce the court went far towards declaring that Congress is subject to no limitations in this field. In Weber v. Freed[15] it was declared frivolous to contend that Congress could not prohibit the introduction into the country of films or other

Law Quarterly 320; A. M. Kales, "Due Process, the Inarticulate Major Premise and the Adamson Act," 26 *Yale Law Journal* 519; T. R. Powell, "The Supreme Court and the Adamson Law," 65 *University of Pennsylvania Law Review* 607. See also notes in 30 *Harvard Law Review* 739, and 26 *Yale Law Journal* 496. For articles written before the decision was rendered, see M. H. Lauchheimer, "The Constitutionality of the Eight-Hour Railroad Law," 16 *Columbia Law Review* 554; T. R. Powell, "Due Process and the Adamson Law," 17 *Columbia Law Review* 114. See also 30 *Harvard Law Review* 63.

[14] (1908) 208 U. S. 161.

[15] (1915) 239 U. S. 325. In Pantomimic Corporation v. Malone (1916) 238 Fed. 135, it was held that a picture was brought into the United States when films in Canada were photographed by a camera in the United States. No corporeal object crossed the border. See note in 84 *Central Law Journal* 191. To a similar effect is United States v. Johnston (1916) 232 Fed. 970. See 19 *Law Notes* 44, and 20 *Law Notes* 162.

pictorial representations of prize fights. The power of Congress over foreign commerce was referred to as "complete," thus implying that it could prohibit the importation of any articles that it pleases. The allegation that the motive of Congress was to prohibit the exhibition of the pictures and thus to invade the domain of state authority was said to be something that the court could not inquire into. It was pointed out that if the contrary were sustained no congressional prohibition would be valid.

In Brolan v. United States[16] it was held that the contention that Congress could not constitutionally punish the knowing receipt, concealment or facilitation of transportation of opium which had been successfully imported from a foreign country in violation of the federal statute was too unsubstantial and frivolous to justify a writ of error from the Supreme Court to the district court.[17] The chief justice declared that, since the power of Congress to prohibit the importation was absolute, "it must endure and reach beyond the mere capacity of persons to evade its commands to the control of those things which are essential to make the power existing and operative." Cases relating to interstate commerce which were cited by counsel for the defendant were dismissed because of the "broad distinction which exists between the two powers." This declaration negatives the doctrine countenanced in some opinions to the effect that the congressional power over interstate commerce is as plenary as that over foreign commerce.[18] The sound basis for a distinction between congressional power over foreign commerce and that over commerce among the several states would seem to rest, not in the commerce clause, but in the due-process

[16] (1915) 236 U. S. 216.

[17] For an interpretation of the federal statute regulating, through a combination of the commerce and the taxing power, the sale and use of drugs, see United States v. Jin Fuey Moy (1916) 241 U. S. 394. The statute was sustained in United States v. Brown (1915) 224 Fed. 135. See 64 *University of Pennsylvania Law Review* 502.

[18] "The power conferred upon Congress to regulate commerce among the states is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class

clause. A complete embargo on foreign commerce would be due process while such an embargo on interstate commerce would not. Therefore congressional interferences with interstate commerce require justifications not necessary for the prohibition of any foreign commerce.

In distinguishing the Brolan case from Keller v. United States,[19] which declared that Congress could not punish the harboring of alien prostitutes, the court pointed out that the statute in the Keller case was not confined to the harboring of those who entered the country unlawfully, and called attention to the amended statute which was applicable only to the harboring of those immoral aliens who had come to the United States in violation of the prohibitions of the statute, thus lending color to the implication that the amended statute would be sustained.

Another statute dealing with alien prostitutes came before the court in United States v. Lombardo.[20] This enactment made it a crime for the harborer of an alien prostitute to fail to file with the commissioner general of immigration a statement giving the facts connected with such harboring. The district court had held that the statute violated the fourth and fifth amendments as well as the sixth. The Supreme Court confined its attention to the sixth amendment. It held that the offense of failure to file could be committed only in the district where the statement was to be filed, and therefore dismissed a prosecution begun in the district where the harborer was domiciled. Previously it had been held in United States v. Portale[21] that the requirement of the statute was not confined to those who have had to do directly or indirectly with the bringing in

and character and equally extensive." Mr. Justice Matthews in Bowman v. Chicago and Northwestern R. Co. (1888) 125 U. S. 465, 482. "It has frequently been laid down by this court that the power over interstate commerce is as absolute as it is over foreign commerce." Mr. Justice Bradley in Crutcher v. Kentucky (1891) 141 U. S. 47, 57. See also Champion v. Ames (1903) 188 U. S. 321, 351.

[19] (1909) 213 U. S. 318.

[20] (1916) 241 U. S. 73.

[21] (1914) 235 U. S. 33.

or sending forth of the alien. In neither of these cases was the constitutionality of the statute directly in issue.

In dealing with the section of the White Slave Act relating to interstate commerce, Caminetti v. United States[22] held that the statute forbade the transportation of a woman for immoral purposes even though the immorality was unaccompanied by expectation of pecuniary gain, and that the statute thus interpreted and applied was constitutional. Other cases involving the exertion of federal power over interstate commerce held that Congress could make contraband of interstate commerce drugs contained in packages bearing false labels as to their curative qualities,[23] and could create a right of action in favor of an employee of an interstate carrier injured through a violation of the federal Safety Appliance Act, even though such employee was not engaged in interstate commerce.[24] The cases deciding whether plaintiffs suing under the federal Employers' Liability Act were engaged in interstate or intrastate commerce are too numerous to mention.[25] But the fact that a litigant must be in doubt as to the kind of commerce in which he is en-

[22] (1917) 242 U. S. 470. Chief Justice White and Justices McKenna and Clarke dissented on the question of interpretation. The opinion of Mr. Justice McKenna contains an interesting analysis of the problem of interpreting the meaning of a statute. See 84 *Central Law Journal* 171, 3 *Cornell Law Quarterly* 60, 30 *Harvard Law Review* 494, 15 *Michigan Law Review* 425. In United States v. Holte (1915) 236 U. S. 140, it was held, Justices Lamar and Day dissenting, that the woman transported in violation of the statute could be punished for conspiracy to commit a crime against the United States. See 80 *Central Law Journal* 194.

[23] Seven Cases v. United States (1916) 239 U. S. 510. See 82 *Central Law Journal* 172. For the application of the federal Food and Drugs Act to Coca Cola, see United States v. Forty Barrels (1916) 241 U. S. 265.

[24] Texas & Pacific Ry. Co. v. Rigsby (1916) 241 U. S. 33. See 82 *Central Law Journal* 385, and 2 *Virginia Law Register*, n. s. 388.

[25] For a list of cases holding that the employee was engaged in interstate commerce see the brief for the plaintiff in error in Erie Railroad Co. v. Welsh (1916) 242 U. S. 303, as printed in 61 Lawyers' Edition 319–322. See notes in 82 *Central Law Journal* 421, 84 *Central Law Journal* 154, 15 *Michigan Law Review* 157. The cases on this question for the past three years will be found in the General Index at the end of volumes 59, 60, and 61 of the Lawyers' Edition of the Supreme Court Reports under the title "Master and Servant," subtitle "Employers' Liability Act."

gaged until he learns from the Supreme Court several years after his injury or death, indicates a most unsatisfactory feature of the existing partition of the law of torts between the state and national governments. This will be even more apparent when we consider the cases holding that state workmen's compensation laws cannot apply to injuries within the scope of the Employers' Liability Act or of the admiralty jurisdiction of the federal courts.[26]

The other cases touching the power of Congress over commerce merely reiterate and apply familiar doctrines. Essex v. New England Telegraph Co.[27] held that Congress could give telegraph companies the right to maintain lines along military and post roads, secure from arbitrary interference by the state. This case was not based directly on the commerce clause, but that clause might be the basis for statutes applying specifically to telephone companies conducting an interstate business. Louisville Bridge Co. v. United States[28] held that the continuing power of Congress over interstate commerce included authority to compel the alteration of a bridge over a navigable highway of the United States, even though such bridge had been erected under previous congressional authority, had been recognized as a post road of the United States and had complied with all previous laws of Congress. The franchise previously granted was held not to be irrepealable. Therefore no vested right was interfered with by making the owner pay the cost of the alterations. The case also sustained the delegation of power to the secretary of war to determine what would constitute an unreasonable interference with navigation, and said that there was "no real inconsistency between a declaration by Congress in 1865 that a certain bridge was a lawful structure and not an improper impediment to navigation, and a contrary finding by the secretary of war in the year 1914." The contention that Congress had less power over bridges erected under federal authority than over those sanctioned by the states was said to be without merit.

[26] See *infra*, pp. 41–45.
[27] (1915) 239 U. S. 313.
[28] (1917) 242 U. S. 409.

United States v. Nice[29] held that Congress may forbid the sale of liquor to Indians in a state so long as they remain tribal Indians under national guardianship. American Express Co. v. South Dakota[30] held that Congress could and did invest the interstate commerce commission with power to direct the alteration of intrastate rates when this was necessary to remove a discrimination against interstate commerce. And Thomson v. Cayser[31] declared invalid under the Sherman Act a combination of ocean carriers which gave rebates to those who shipped exclusively by the associated lines. It is perhaps worthy of note that no cases of great public interest have been passed upon by the Supreme Court under the Sherman Act during the past three years.[32] Cases now pending, however, may give us during the present year more light on the intricate and confused problem of determining what restraints of trade are within and what without the "rule of reason" announced in the Standard Oil and Tobacco cases.

[29] (1916) 241 U. S. 591.

[30] (1917) 244 U. S. 617. Mr. Justice McKenna dissented.

[31] (1917) 243 U. S. 66.

[32] For other cases involving interpretations or applications of the Sherman Act see United Copper Securities Co. v. Amalgamated Copper Co. (1917) 244 U. S. 461; Paine Lumber Co. v. Neal (1917) 244 U. S. 459; United States v. American Asiatic S. S. Co. (1917) 242 U. S. 537; Fleitmann v. Welsbach Street Lighting Co. (1916) 240 U. S. 27; Lawlor v. Loewe (1915) 235 U. S. 522; D. R. Wilder Mfg. Co. v. Corn Products Co. (1915) 236 U. S. 165. In cases interpreting the patent statute it has been held that the monopoly of the patentee does not include the right to restrict the resale price of patented articles, Straus v. Victor Talking Machine Co. (1917) 243 U. S. 490, or to prescribe the materials with which patented articles may be used, Motion Picture Patents Co. v. Universal Film Manufacturing Co. (1917) 243 U. S. 502. Thus such restrictions imposed by the patentee must be created by collateral contract, and the contract must pass muster under the Sherman Act and its amendments. See E. P. Grosvenor, "The 'Rule of Reason' as Applied by the United States Supreme Court to Commerce in Patented Articles," 17 *Columbia Law Review* 208; T. R. Powell, "The Nature of a Patent Right," 17 *Columbia Law Review* 663. See also 17 *Columbia Law Review* 543, and 31 *Harvard Law Review* 298.

THE COMMERCE CLAUSE AND THE POWERS OF THE STATES

A. State taxation and interstate commerce

Prior to 1910 it had been assumed that any state tax on a foreign corporation for the privilege of engaging in intrastate commerce within the state would be valid. But, in Western Union Telegraph Co. v. Kansas[33] and Ludwig v. Western Union Telegraph Co.,[34] taxes imposed by Kansas and Arkansas on the intrastate commerce done by a foreign corporation engaged also in interstate commerce were declared invalid because they were measured by the total capital stock of the corporation. The method by which the amount of the tax was determined was held to make the imposition an invalid regulation of interstate commerce, in spite of the fact that the subject on which the tax fell was not immune from the power of the state. After these decisions Kansas and Arkansas amended their statutes. The new Kansas statute, as interpreted by the state court, selected as the measure of a tax on foreign corporations for the privilege of doing local business, not the total capital stock, but only such proportion thereof as was represented by property in Kansas employed in purely local business. In addition there was a provision that the maximum imposition in any one year should be $2500. This statute was sustained in Lusk v. Botkin.[35] The Arkansas statute was similar, except that there was no maximum limit set to the amount which might be charged. In St. Louis S. W. R. Co. v. Arkansas[36] the court applied this statute and upheld a tax of $6798.26 on a foreign corporation whose property owned and used in the state for intrastate commerce was valued at $13,586,520.

The amended Kansas statute measured the tax on the franchises of domestic corporations by the total capital stock as before, but here also limited the annual imposition to $2500. This was sustained in Kansas City, F. S. & M. R. Co. v. Botkin.[37]

[33] (1910) 216 U. S. 1.
[34] (1910) 216 U. S. 146.
[35] (1916) 240 U. S. 236.
[36] (1914) 235 U. S. 350.
[37] (1916) 240 U. S. 227.

The opinion of the court seemed to assume that the doctrine that a tax on a proper subject might be invalid because of the measure adopted for determining its amount applied to the taxation of domestic as well as of foreign corporations. It declared that "every case involving the validity of a tax must depend upon its own facts," and that the question was whether the operation and effect of the statute as enforced could be regarded as imposing a burden on interstate commerce. In view of the fact that the maximum charge was $2500, it found "no ground for saying that a tax of this character, thus limited, is in any sense a tax imposed upon interstate commerce."

The Arkansas statute applicable to domestic corporations was like the Kansas statute, except that no maximum was set. This too was sustained in Kansas City, M. & B. R. Co. v. Stiles[38] in an opinion which by its reliance on Ashley v. Ryan[39] seems to indicate that the franchises of domestic corporations may be taxed as the state pleases, even though the corporation is engaged in interstate as well as intrastate commerce. Thus the doctrine announced by the Western Union cases in 1910 appears to be limited to foreign corporations. The moderation of Kansas as compared with Arkansas may have been influenced by the fact that one of the reasons for sustaining, in Baltic Mining Co. v. Massachusetts,[40] a tax on foreign corporations measured by total capital stock was that the maximum imposition was $2500. The subsequent cases sustaining and applying the Arkansas statutes show that no maximum is necessary where the tax on foreign corporations is measured by that part of the capital represented by property used in the state for local business or where the tax on domestic corporations is measured by the total capital stock.

A tax on domestic corporations measured by receipts from intrastate transportation was upheld in New York *ex rel.* Cornell Steamboat Co. v. Sohmer.[41]

[38] (1916) 242 U. S. 111.

[39] (1894) 153 U. S. 436.

[40] (1913) 231 U. S. 68. For a note on the validity of an amendment to the Massachusetts statute sustained in this case, see 16 *Michigan Law Review* 246.

[41] (1915) 235 U. S. 549.

In other cases relating to interstate commerce it was held that a state could not impose a privilege tax on a liquor business within the state which consisted solely in soliciting and filling mail orders from customers in other states,[42] or on agents of a nonresident portrait manufacturer who delivers within the state portraits sent from without the state, even though the agent also offers customers a choice of frames at the time of delivering the pictures.[43] Though the sale of the frames was an intrastate matter, it was treated as a part of the interstate transaction within the doctrine previously announced by Mr. Justice Holmes that "commerce among the several states is a practical conception, not drawn from the 'witty diversities' of the law of sales."[44] Similarly it was held, in Western Oil Refining Co. v. Lipscomb,[45] that a state privilege tax could not be imposed on a foreign corporation shipping oil and steel into the state, though the cars in which the merchandise was shipped were billed to one town in the state, from which orders taken there were filled, and were then rebilled to another town to fill other orders, since the intrastate transportation was both in fact and in law a connected part of a continuous interstate movement.

Two cases upholding state requirements on motor vehicles from other states involve a combination of the police power and the taxing power. Hendrick v. Maryland[46] sustained a state statute requiring the registration of motor vehicles and a license fee graded according to the horse power of the engine, and applied it to motor vehicles owned in other states using the highways of the state on an interstate journey. The propriety of requiring the license seemed to be based on the absence of congressional legislation covering the subject; but

[42] Heyman v. Hays (1915) U. S. 178; Southern Operating Co. v. Hays (1915) 236 U. S. 188.

[43] Davis v. Virginia (1915) 236 U. S. 697. See 1 *Virginia Law Register*, n. s. 235.

[44] Rearick v. Pennsylvania (1906) 203 U. S. 507. See H. H. Foster, "What is Left of the Original Package Doctrine," 1 *Southern Law Quarterly* 303.

[45] (1917) 244 U. S. 346.

[46] (1915) 235 U. S. 610. See 80 *Central Law Journal* 123, and 51 *National Corporation Reporter* 140.

the imposition of the fees was justified on the ground that automobiles used a facility constructed by the state at great expense, and that such use was abnormally destructive to such facilities and thereby increased the expense to the state in providing them. Apparently such exactions in return for the use of state facilities would be proper even though Congress had so acted that no license could be required. The statute contained a provision whereby nonresident operators of automobiles who had complied with the laws of the state in which they reside might, on certain conditions, obtain permission to operate their machines in Maryland for not exceeding two periods of seven consecutive days in a calendar year without paying the ordinary fees for registration and operator's license. This provision did not apply to residents of the District of Columbia, but the plaintiff in error, though a resident of the District, was held disentitled to complain of this discrimination because he had not himself complied with the laws of the District or with the conditions attached to the grant of the privilege to residents of other states.

Kane v. New Jersey[47] involved a similar statute, but without any reciprocal provision in favor of nonresidents whose cars are duly registered in their own state. The absence of such a provision was held unimportant. There was said to be no discrimination against nonresidents by making them pay the full annual fee for a brief use of the state highways, since residents had to pay the annual fee however little they used their machines. In this reasoning Mr. Justice Brandeis seemed to sacrifice substance to form. Nonresident owners were also required to secure a license and to appoint the secretary of state their agent upon whom process might be served in any legal proceedings occasioned by the operation of their machines within the state. But this and the further fact that Kane was driving through, and not merely into, New Jersey were held not sufficient to differentiate the New Jersey statute from that of Maryland.

[47] (1916) 242 U. S. 160.

B. State police power and interstate commerce

(a) In absence of congressional regulation

Five cases held state action an unwarranted interference with interstate commerce, even though the state statutes conflicted with no congressional regulation. Chicago, B. & Q. R. Co. v. Railroad Commission[48] annulled an order of the Wisconsin Railroad Commission requiring a railroad running only interstate trains to stop at least two trains each way each day at every village having two hundred or more inhabitants. Seaboard Air Line Railway Co. v. Blackwell[49] held inapplicable to interstate trains a state requirement that every engineer shall check the speed of his train when four hundred yards from every public crossing and slow down so as to stop in time to avoid any person or thing crossing on the track. The decision was influenced by the facts as to the number of such crossings in the state and the absence of conditions making them peculiarly dangerous. It appeared that the statute would add three minutes per crossing to the running time of interstate trains and thereby double the time of traversing the state.

South Covington & C. Street R. Co. v. Covington[50] annulled a requirement as to the number of cars to be provided by an interstate street railway and as to the number of persons to be admitted to each car, since it appeared that this would require more cars than the company would be permitted to operate in the city of an adjoining state. Sioux Remedy Co. v. Cope[51] held that South Dakota could not impose on foreign corporations desiring to bring suit in state courts for money due for merchandise shipped in interstate commerce the condition that such corporation must first appoint a resident agent upon whom process could be served, and file with the designated state officer

[48] (1915) 237 U. S. 220. See 19 *Law Notes* 52.

[49] (1917) 244 U. S. 310. The chief justice and Justices Pitney and Brandeis dissented.

[50] (1915) 235 U. S. 537.

[51] (1914) 235 U. S. 197. See 49 *American Law Review* 601, 63 *University of Pennsylvania Law Review* 433, and 2 *Virginia Law Review* 470.

a copy of such appointment and a copy of its charter, paying certain fees for such filing. The result of this decision was to compel South Dakota residents having claims for breach of contract against the foreign corporation to go to the domicil of the corporation to bring suit unless some creditor or property of the corporation could be found within the state. But of course the foreign corporation, subject to the same qualifications, had to go to the domicil of its debtors to collect what was due.

Donald v. Philadelphia & R. Coal and Iron Co.[52] forbade a state to exclude from local business a foreign corporation engaged in interstate commerce which removed to the federal courts a suit brought against it in the state court. The opinion seemed to go on the ground that the statute interfered with the constitutional right to remove cases to the federal courts and warrants the inference that the same decision would have been reached had the corporation in question not been engaged in interstate commerce. It thus lays the basis for overruling Security Mutual Life Insurance Co. v. Prewitt[53] when a case not involving interstate commerce shall again arise for decision.

More numerous were the cases in which state action was held not to interfere with interstate commerce. Interstate Amusement Co. v. Albert[54] sustained the dismissal of a suit in a state court brought by a foreign corporation which had failed to file a copy of its charter with the secretary of state. The plaintiff made bookings for theatrical troupes within the state. The state court found that such interstate commerce as took place as a result of plaintiff's contracts was merely incidental to those contracts, and the Supreme Court sustained the ruling because the evidence before the state court did not clearly show otherwise. It is quite likely that if the case had been better presented by counsel it would be found to come within the doctrine of Sioux Remedy Co. v. Cope.[55] In that case, however, the foreign corporation did not enter the state at all.

[52] (1916) 241 U. S. 329.
[53] (1906) 202 U. S. 246.
[54] (1916) 239 U. S. 560.
[55] *Supra*, note 51.

It merely shipped goods into the state. Here the corporation was within the state evidently doing business which was partly intrastate and partly interstate. Whether such a corporation which disregards the state law as to filing its certificate could be restrained from suing on a contract of interstate commerce is exceedingly doubtful. Disobedience of the lawful requirement as to intrastate business can hardly justify a state interference with interstate commerce, and conditions imposed on the right to sue in state courts are held by the Cope case to be interferences with the commerce out of which the cause of action arose. The opinion in the Albert case makes no mention of the provision in the state statute that foreign corporations filing the required certificate should be treated as within the jurisdiction as fully as if it were a domestic corporation, though the statute to this effect is quoted in the margin.

Several of the cases related to alleged undue interferences with interstate trains. It was held that, in the absence of congressional regulation on the subject, the state could require all locomotives to be equipped with headlights of not less than 1500 candle power;[56] could forbid switching operations across public crossings in cities of the first or second class with a switching crew of less than one engineer, a fireman, a foreman and three helpers;[57] and could require suitable guard rails for, and proper cleanliness and ventilation of, the cars of a street railway company engaged principally in interstate commerce.[58] But this last decision held unreasonable a requirement that the cars be kept heated at a temperature not below fifty degrees Fahrenheit when it appeared that the necessary opening of doors made this impracticable. This portion of the decision seemed independent of the commerce clause, but that clause was the foundation for the decision that requirements as to the number of cars were invalid, since they would necessarily interfere with the conduct of the business in other states.[59]

[56] Vandalia Railroad Co. v. Public Service Commission (1916) 242 U. S. 255.
[57] St. Louis, I. M. & S. R. Co. v. Arkansas (1916) 240 U. S. 518.
[58] South Covington & C. Street R. Co. v. Covington, *supra*, note 50.
[59] *Supra*, p. 33.

By construing the Oklahoma separate-coach law as applying only to intrastate commerce, the court was relieved from considering whether it was an unlawful regulation of interstate commerce.[60] In Chicago, M. & St. P. R. Co. v. State Public Utilities Commission,[61] a state regulation of a local rate was sustained in the absence of any showing that it resulted in giving commercial advantages to domestic shippers and producers over those from other states. And in Wilmington Transportation Co. v. Railroad Commission[62] the absence of federal regulation was held to leave the state free to prescribe rates for the transportation of passengers by sea between two ports in the same state, although the course of such transportation was over the high seas.

In Illinois Central Railroad Co. v. Mulberry Hill Coal Co.[63] a state statute requiring an interstate railway company to furnish cars to shippers within a reasonable time after demand was made the basis for an action by the shipper for recovery of damages for failure to furnish cars at his mine for interstate transportation of his coal, where the state court had held that the question of what is a reasonable time in any case depends upon all existing circumstances including the requirements of interstate commerce. The case is treated as though it arose in the absence of congressional action on the subject of furnishing cars for interstate commerce shipments. The railroad contended in the Supreme Court that the state statute even though originally valid was rendered inapplicable by the Hepburn Act, but the claim was dismissed from consideration because it had not been raised in either of the state courts. If duly raised, it would seem that the claim should be sustained. But the plaintiff could then amend or bring another action relying on the Hepburn Act.

[60] McCabe v. Atchison, T. & S. F. R. Co. (1914) 235 U. S. 151. See 49 *American Law Review* 600.

[61] (1917) 242 U. S. 333.

[62] (1915) 236 U. S. 151. See 28 *Harvard Law Review* 634. A note to the decision in the state court will be found in 2 *California Law Review* 231.

[63] (1915) 238 U. S. 275.

Pennsylvania Railroad Co. v. Sonman Shaft Coal Co.[64] shows that the state court could entertain such an action under the federal statute. In this case the state court had held that the Hepburn Act did not apply because the request was for cars for coal sold f.o.b. at the mine, and the commerce involved was intrastate even though the coal was going to purchasers outside the state. But the Supreme Court ruled that this was error, quoting its declaration six months earlier in Pennsylvania Railroad Co. v. Clark[65] to the effect that "the movement thus initiated is an interstate movement and the facilities required are facilities of interstate commerce."

Three cases involved state statutes relating to food. Price v. Illinois[66] permitted a state to forbid the sale of food preservatives containing boric acid and to apply the prohibition to small envelopes suitable for the consumer where it did not appear that these envelopes were segregated in commercial shipments into the state or were separately introduced. The citation of previous authorities indicated that the court would not have regarded the envelope as a legitimate commercial package even if each envelope had been separately introduced into the state. In Armour & Co. v. North Dakota[67] a state statute requiring lard sold at retail to be put in one, three, or five-pound packages, when applied to retail sales not in the original package, was held valid.

Sligh v. Kirkwood[68] involved a statute forbidding the shipment from the state of citrous fruits which are immature or otherwise unfit for consumption. The purpose of the statute was recognized to be the economic one of protecting the reputation of Florida oranges in the markets of other states. This

[64] (1915) 242 U. S. 120. See 84 *Central Law Journal* 25, and 65 *University of Pennsylvania Law Review* 368.

[65] (1915) 238 U. S. 456.

[66] (1915) 238 U. S. 466.

[67] (1916) 240 U. S. 510. For further consideration of this case, see *infra*, p. 40.

[68] (1915) 237 U. S. 52. See 80 *Central Law Journal* 361, 19 *Law Notes* 52, and 13 *Michigan Law Review* 698. This case and the one preceding held also that the states were not foreclosed from passing their statutes because of the federal Food and Drugs Act.

was held to be a legitimate object of state action, and the fact that the embargo incidentally affected interstate commerce was held to be immaterial so long as Congress had not acted. The court did not squarely assert that such unripe fruits were unmerchantable and therefore not subjects of commerce. It implied that if a case arose where the desired shipment was for commercial purposes and not for consumption the decision might be different. The statute seems to have presented a question not answered by previous decisions. It can hardly be regarded as an instance of indirect effect on interstate commerce. The effect is as direct as is the prohibition against sending oil or natural gas from the state, which is held unconstitutional.[69] The case shows pretty clearly that what the court considers in dealing with state interferences with interstate commerce is whether the effectuation of the local policy outweighs in importance the resulting disadvantage of clogging somewhat the channels of interstate commerce. The judgment in Sligh v. Kirkwood invites comparison with that in Heyman v. Hays[70] refusing to allow the states to tax the business of selling liquor to customers in other states.

The commerce clause was unsuccessfully invoked by objectors to state legislation against trading stamps,[71] and state regulation of the sale of securities[72] and the exhibition of motion pictures.[73] The motion-picture statutes required administrative inspection and approval as a condition prerequisite to the exhibition of the films within the state. Mr. Justice McKenna said that "it would be straining the doctrine of original

[69] West v. Kansas Natural Gas Co. (1911) 221 U. S. 229.

[70] *Supra*, note 42.

[71] Rast v. Van Deman & Lewis Co. (1916) 240 U. S. 342. See 25 *Yale Law Journal* 670.

[72] Hall v. Geiger-Jones Co. (1917) 242 U. S. 539; Caldwell v. Sioux Falls Stock Yards Co. (1917) 842 U. S. 559; Merrick v. N. W. Halsey Co. (1917) 242 U. S. 568. Mr. Justice McReynolds dissents in all three cases, but without opinion, so it is impossible to tell whether his dissent is based on the commerce clause or on the fourteenth amendment or on both. See 80 *Central Law Journal* 175, and 17 *Columbia Law Review* 244.

[73] Mutual Film Corporation v. Industrial Commission (1915) 236 U. S. 230; Mutual Film Corporation v. Hodges (1915) 236 U. S. 248.

packages to say that the films retain that form and composition even when unrolling and exhibiting to audiences, or, being ready for renting for the purpose of exhibition within the state, could not be disclosed to the state officers." Since the state law punishes only unlicensed exhibition, it is not important that the "exchanges" which receive the films from other states "can more conveniently submit the films for approval than exhibitors can."

"Blue Sky" legislation was said to impose only an indirect or incidental burden on interstate commerce, which was entirely proper so long as Congress had not acted. The opinion of the court raised several interesting questions as to when choses in action "cease migration in interstate commerce and settle to the jurisdiction of the state." It suggested the possibility that nothing more was necessary for the supremacy of the national power than that the securities be kept free from state interference when in actual transportation, but the point was not definitely passed upon. The court seemed clear that the original-package doctrine could not be applied in its full rigor to choses in action represented by printed documents. But the case went on the ground that, even conceding that the securities were "still in interstate commerce after their transportation to the state is ended and they have reached the hands of dealers in them, their interstate character is only incidentally affected" by regulations designed to prevent the sale within the state of those that are fraudulent.

The contention that the license fee on merchants issuing trading stamps was a regulation of interstate commerce was confined to the instances where the trading stamps were inserted in the retail packages by extrastate manufacturers or shippers and were redeemed by them or by some other concern outside the state. But the court answered that this claimed for the manufacturer outside the state the right not only to introduce into the state the original packages containing the coupons, but also to have them disposed of through retail sales within the state. This latter claim was said to be without foundation in the commerce clause.

(b) After congressional regulation

State action affecting interstate commerce is not necessarily precluded by congressional regulation of the same subject. Such state interference must, however, not impose a direct burden on interstate commerce and must not be inconsistent with the requirements laid down by Congress. In several cases these qualifications of valid state action were held to have been satisfied. Michigan Central Railroad Co. v. Michigan Railroad Commission[74] sustained an order of a state railroad commission compelling an interurban electric railroad and a steam railroad to interchange cars, passenger traffic, etc., at the point of their intersection. The order applied only to intrastate commerce. The Supreme Court held that it would assume, until the contrary was made to appear, that compliance with the order involved no disregard of the needs of interstate commerce. Similarly in Missouri Pacific Railway Co. v. McGrew Coal Co.[75] it was held that an unconstitutional interference with interstate commerce did not necessarily result from a state requirement that railroad companies should not charge more for shorter than for longer intrastate hauls.

In Armour & Co. v. North Dakota[76] a state statute requiring lard sold at retail to be put up in packages of prescribed weights was held not to be repugnant to the federal Food and Drugs Act, which was directed merely against adulteration and misbranding of articles of food transported in interstate commerce. One who complied with the federal act might violate the state act, but Congress had not intended to cover all possible regulation by dealing with the specified evils of adulteration and misbranding. And in Selling v. Radford[77] it was declared that the federal Employers' Liability Law did not pre-

[74] (1915) 236 U. S. 615.

[75] (1917) 244 U. S. 191.

[76] *Supra*, note 67. See also Sligh v. Kirkwood, *supra*, note 68. The decisions holding that federal regulation has not inhibited by implication the exercise by the states of their reserved police power are summarized in detail in the margin of the dissenting opinion of Mr. Justice Brandeis in New York C. R. Co. v. Winfield (1917) 244 U. S. 147, 156.

[77] (1917) 243 U. S. 43.

vent the application of state workmen's compensation statutes to employees of carriers engaged in interstate commerce, so long as the employee was not himself engaged in such commerce and could not therefore under any circumstances sue under the federal law.

Where, however, the employee of an interstate carrier is himself engaged in interstate commerce, his rights under the federal Employers' Liability Act for injuries occurring in such interstate commerce are all that he has. New York C. Ry. Co. v. Tonsellito[78] held that the common-law right of the father of a minor son to recover for expenses incurred for medical attention to the son and for loss of the son's services did not survive the enactment of the federal statute. The congressional enactment furnishes the only existing law regulating the liabilities of interstate carriers to employees injured while engaged in interstate commerce.

In New York Central Railroad Co. v. Winfield[79] and in Erie Railroad Co. v. Winfield,[80] the federal statute was held to preclude the operation of state workmen's compensation laws to interstate commerce injuries. Mr. Justice Brandeis, dissenting, urged that the purpose of the federal enactment was confined to the abolition of the common-law defenses of the fellow-servant rule and the doctrines of contributory negligence and assumption of risk in cases where the defendants were negligent. He argued that it was not "the purpose of the act to deny to the states the power to grant *the wholly new right* to protection or relief in the case of injuries suffered otherwise than through fault of the railroads." But only Mr. Justice Clarke concurred in this interpretation. The majority held that Congress intended the statute to be "as comprehensive of those instances in which it by silence excludes liability as of those where liability is imposed."

[78] (1917) 244 U. S. 360.

[79] (1915) 244 U. S. 142. See 3 *Cornell Law Quarterly* 45, and 2 *Minnesota Law Review* 49. For notes on the decision in the state court see 82 *Central Law Journal* 43, 1 *Cornell Law Quarterly* 272, 29 *Harvard Law Review* 439, and 64 *University of Pennsylvania Law Review* 304.

[80] (1917) 244 U. S. 170.

Mr. Justice Van Devanter observed that the liability of interstate carriers in such respects is a matter "in which the nation as a whole is interested and [that] there are weighty considerations why the controlling law should be uniform and not change at every state line." Quoting from Prigg v. Pennsylvania[81] he said that the silence of Congress "as to what it does not do is as expressive of what its intention is as the direct provisions made by it." The interpretation of silence is of course not a literary task. Sometimes silence is held to give consent, sometimes to imply refusal. Whether Congress meant its rules to cover only cases of negligence or to cover all cases of injury and to limit recovery to injuries due to negligence is impossible of ascertainment, since probably Congress did not think about workmen's compensation legislation at all.

What Professor Munroe Smith has said about the work of the Supreme Court in the interpretation of the Constitution is equally true of the interpretation of statutes. "This tribunal," he says, "not only thinks out the thoughts which the Fathers were trying to think one hundred and twenty years ago, but it undertakes to determine what they would have thought if they could have foreseen the changed conditions and the novel problems of the present day."[82]

An important consideration in determining whether novel state action was precluded by previous congressional action is the practical consequences of the concurrent existence of the two systems of liability. Since individual employees of interstate carriers are engaged sometimes in interstate commerce and sometimes in domestic commerce, it would be difficult for the carrier or the state to fix the proper assessments that any such carrier should pay to a state insurance fund. And there are disadvantages in having the carriers subject to different methods of payment for injuries and to different tribunals for determining the amount of such payments. The situation is undesirable whether the state compensation statute is held applicable or inapplicable.

[81] (1842) 16 Pet. 539.

[82] *Jurisprudence*, page 30 (Columbia University Press, 1908).

There is pressing need for new legislation by Congress. The Employers' Liability Law was enacted to introduce a more modern conception of liability than that which prevailed in the law of the states. Since the law was passed, many of the states have not only caught up with Congress, but have advanced to a point beyond. Congress should speedily devise some plan whereby the compensation feature of state legislation applies to interstate commerce injuries at least in those states which have compensation statutes. Injured employees should be relieved from doubt as to the forum in which to begin action or as to the rule of liability or of compensation to allege and rely on. The dissenting opinion of Mr. Justice Brandeis points out that during the 1915 term of the Supreme Court, thirty-seven of the ninety-three cases relating to the Employers' Liability Act involved the question whether the employee was engaged in interstate or intrastate commerce. The suitor who mistakes the nature of the commerce in which he was employed at the time he was hurt has to begin his action all over again.[83] Congress should make his remedy definite and certain even if it cannot at the same time make the rule of liability as satisfactory as that which the most enlightened state may now or in the future prescribe.

In Southern Pacific Co. v. Jensen,[84] the New York workmen's compensation law was also declared inapplicable to injuries within the admiralty and maritime jurisdiction of the federal courts. The injury sued for was also held not to be within the purview of the federal Employers' Liability Law. Shortly after the decision Congress amended the federal Judicial Code so that in prescribing the exclusive admiralty jurisdiction of the federal courts, suitors are saved their remedies

[83] If before trial plaintiff decided that he was engaged in interstate commerce when he was hurt, he may amend his declaration without bringing suit anew. Kansas City W. R. Co. v. McAdow (1916) 240 U. S. 51. See 82 *Central Law Journal* 189.

[84] (1917) 244 U. S. 205. Mr. Justice Holmes and Mr. Justice Pitney filed dissenting opinions which were concurred in by Justices Brandeis and Clarke. See 6 *California Law Review* 69, 3 *Cornell Law Quarterly* 38, and 17 *Columbia Law Review* 703.

under the compensation law of any state.[85] This will raise the question whether such a state statute can apply to injuries which are within both the maritime jurisdiction and the federal Employers' Liability Law. And if suitors may elect whether to proceed in admiralty or under the Employers' Liability Law or under the state workmen's compensation statute, the employer may be subject to a double liability. He may insure in a state fund and then be subjected to suit and judgment in admiralty, thus losing both his premiums and the sum awarded by the admiralty court. If the employee seeks compensation under the state act, the state may shield the employer by insisting that the claimant release him from further liability. But the admiralty court cannot well render back to the employer the premiums he may have paid to the state fund in anticipation that the employee would proceed against that fund. Such are some of the difficulties arising out of the federal system. They invite earnest consideration and wise statesmanship to the end that they may be greatly minimized if not entirely obviated.

The remaining cases holding state regulations invalid because of previous congressional action all involve requirements on interstate carriers. The federal Safety Appliance Act was held to preclude a state requirement that grab irons or hand holds be placed on the sides or ends of every railway car.[86] The Interstate Commerce Act was held to furnish the sole right of recovery for damages due to an overcharge for interstate transportation.[87] The Carmack Amendment was held to preclude the application to an interstate shipment of a state law investing the innocent holder of a bill of lading with certain rights not available to the shipper,[88] and to render invalid a state require-

[85] Sixth-fifth Congress, First Session, Act of October 6, 1917, Public, No. 82.

[86] Southern Railway Co. v. Railroad Commission (1915) 236 U. S. 439.

[87] Louisville, etc. R. Co. v. Ohio Valley Tie Co. (1916) 242 U. S. 288. See 30 *Harvard Law Review* 400. But where the basis of liability is the failure of the interstate carrier to comply with its own rules as to the distribution of cars, and no exercise of functions by the interstate commerce commission is in issue, action may be maintained in the state court. Pennsylvania Railroad Co. v. Puritan Coal Mining Co. (1915) 237 U. S. 121. See 28 *Harvard Law Review* 816.

[88] Atchison, T. & S. F. R. Co. v. Harold (1916) 241 U. S. 371. See 11 *Illinois Law Review* 373.

ment subjecting a terminal carrier to a penalty of $50 for failure to pay promptly certain claims for damages to interstate shipments.[89] And congressional regulation of interstate commerce, not specifically referred to, was adduced as the reason for refusing to give effect to the order of a state railway commission requiring a carrier to switch cars from the lines of competitors to side tracks within its own terminals, there to be loaded with goods destined for another state.[90]

CONCLUSION

The foregoing review of decisions under the commerce clause shows to what a great extent the judicial umpiring of the federal system is the humdrum task of making the practical adjustments necessitated by the fact that transportation, business and industry in the United States are subject to two or more legislative masters. The decisions declare no far-reaching constitutional principles. In partitioning authority between the states and the nation, the Supreme Court finds in the language of the Constitution only a point of departure.

In threading its way among the details of alleged conflicts between state and national power, it is guided mainly by its practical wisdom and by the counsel it gets from the practical wisdom embodied in previous decisions on analogous questions. The questions which the court has to answer are eminently practical ones. Does it interfere too much with freedom of commercial intercourse between the states to allow a state to regulate the sale of securities within its borders,[91] to say in what packages lard shall be sold,[92] to forbid noxious preservatives in food,[93] to have trains slow down at crossings[94] or stop at rural hamlets?[95] Has the pay of laborers engaged in commerce

[89] Charleston & W. C. R. Co. v. Varnville Furniture Co. (1915) 237 U. S. 597. See F. E. Riddle, "The Carmack Amendment and Common Law Remedies," 82 *Central Law Journal* 207.

[90] Illinois Central Railroad Co. v. De Fuentes (1915) 236 U. S. 157.

[91] *Supra*, note 72.

[92] *Supra*, note 67.

[93] *Supra*, note 66.

[94] *Supra*, note 49.

[95] *Supra*, note 48.

enough to do with the commerce in which they are engaged to make a law about pay a law about commerce?[96] When Congress said that interstate carriers should be liable for injuries caused by their negligence even though the man injured was partly to blame himself, did it mean that the states should not make the carrier liable where no one was to blame?[97] According to certain cherished notions such questions are answered by finding the meaning of language contained in the Constitution or in statutes. But Mr. Justice McKenna, in his dissenting opinion in Caminetti v. United States[98] has described the process of judicial interpretation after a fashion in closer accord with reality:

"Undoubtedly, in the investigation of the meaning of a statute we resort first to its words, and, when clear, they are decisive. The principle has attractive and seemingly disposing simplicity, but that it is not easy of application, or, at least, encounters other principles, many cases demonstrate. The words of a statute may be uncertain in their signification or in their application. If the words be ambiguous, the problem they present is to be resolved by their definition; the subject-matter and the lexicons become our guides. But here, even, we are not exempt from putting ourselves in the place of the legislators. If the words be clear in meaning, but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty. And for this a realization of conditions that provoked the statute must inform our judgment."[99]

Mr. Justice Holmes has reinforced the point in his dissenting opinion in Southern Pacific Co. v. Jensen.[100] "I recognize," he says, "that judges do and must legislate." And then by way of qualification he adds: "But they can do so only interstitially; they are confined from molar to molecular motions."[101]

[96] *Supra*, note 13.
[97] *Supra*, p. 41.
[98] *Supra*, note 22.
[99] 242 U. S. 496.
[100] *Supra*, note 84.
[101] 244 U. S. 221.

An efficiency expert might be inclined to think our way of running the federal system rather cumbrous. We cannot find out what a state can do until the Supreme Court tells us several years after the state has done it. Private individuals have to bear the expense of getting answers to questions that are questions of general public interest. Those who do not think it worth while to spend their time and money in resorting to the Supreme Court may obey the law of the state although the law is one which the court thinks encroaches on the power of the national government. Many state laws which are called invalid in the Supreme Court reports are nevertheless the rules of conduct actually followed by the individuals who do not raise and prosecute their objections. On the other hand the substantial unanimity with which most questions are answered by the court suggests that litigants and counsel who appeal to the highest judicial tribunal may at times be animated by other motives than serious doubts on questions of constitutionality. Few of the questions which they raise are sufficiently difficult so that the judges of the Supreme Court disagree about the answer.

The efficiency expert who ventures to criticize should be willing also to give advice about ways of amelioration. He would doubtless find that any suggestion that the national legislature be vested with full power over all commerce, intrastate as well as interstate, would meet with insuperable objections in the emotions of those who would exalt the independence of their favorite state, and in the judgment of those who believe that the states know best about local needs and should remain the chief ministers to those needs. Those who have watched Congress strain at the task of running a war may not think it best to add permanently to the field of its labors.

Very likely it would be difficult to get sufficient support for any amendment to our federal Constitution which was desired primarily for reasons of efficiency of administration. Yet it would seem that the creation of some national agency which would have power to veto or approve of state laws at the time of their enactment would be a step in advance of our existing

arrangement. It would undoubtedly be imprudent to subject state laws to the approval of Congress. Some body like the Supreme Court seems better adapted to the task of deciding how far the states can go. The court gives little if any grounds for criticism directed against its decisions of these questions. But the same individuals sitting as a council of censors could do the same work to greater public advantage if they could pass upon state laws at the time of their enactment. Individuals would then know with what if any law they must comply. Suitors would then know whether to proceed under federal rules or under those of the state. They would not have to pay the cost of finding out the answer to the questions which concern many others besides themselves.

Such a council of censors could at once suggest to Congress the federal regulation which was advisable when any state law had been disapproved. Some plan might be devised which would give us the advantages of a unitary system of government without compelling us to forego the genuine benefits which accrue from a federal system. The various possible plans are eminently worth thinking about. The review of the commerce decisions of the last three years makes it clear that few cases involve important questions of doctrine or of general policy. The great majority require merely the application of well-established principles to new particulars. It is submitted that the mechanism by which such problems are put before the judges who sit at Washington is susceptible of improvement. The practical situation to be dealt with is infinitely bigger and more complicated than in 1787. If in some way we could lighten the burdens of the Supreme Court, and at the same time secure as wise decisions at a more opportune season, we might demonstrate that constructive genius for devising governmental system exists in the twentieth century as well as in the eighteenth.

(To be concluded)